FILE COPY

FILED
JUL 16
CHARLES ELMORE

Nos. ———

In the Supreme Court of the United States

OCTOBER TERM, 1936

207

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

TEX-PENN OIL COMPANY

208

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

M. L. BENEDUM

209

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

F. B. PARRIOTT

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute and regulations involved	3
Statement	3
Specification of errors to be urged	7
Reasons for granting the writs	8
Conclusion	17
Appendix	18

CITATIONS

Cases:

Ahles Realty Corp. v. *Commissioner*, 71 F. (2d) 150, certiorari denied, 293 U. S. 611	13
Anchor Co. v. *Commissioner*, 42 F. (2d) 99	14
Bus & Trans. Corp. v. *Helvering*, 296 U. S. 391	9
Commissioner v. *Garber*, 50 F. (2d) 588, certiorari denied, 284 U. S. 620	13
Commissioner v. *Moore*, 48 F. (2d) 526, certiorari denied, 284 U. S. 620	13
Emerald Oil Co. v. *Commissioner*, 72 F. (2d) 681	14
Fesler v. *Commissioner*, 38 F. (2d) 155, certiorari denied, 281 U. S. 755	14
First Seattle D. H. Nat. Bank v. *Commissioner*, 77 F. (2d) 45	12
G. & K. Mfg. Co. v. *Commissioner*, 76 F. (2d) 454, certiorari granted, 296 U. S. 563	14
G. & K. Mfg. Co. v. *Helvering*, 296 U. S. 389	9
Gloyd v. *Commissioner*, 63 F. (2d) 649	14
Grand Rapids Store Equipment Corp. v. *Commissioner*, 59 F. (2d) 914	14
Helvering v. *Kendrick Coal & Dock Co.*, 72 F. (2d) 330	14
Helvering v. *Minnesota Tea Co.*, 296 U. S. 378	9
Helvering v. *Rankin*, 295 U. S. 123	10
Helvering v. *Taylor*, 293 U. S. 507	15
Helvering v. *Watts*, 296 U. S. 387	9

80446—36——1

Cases—Continued. Page

Howard v. *Commissioner*, 56 F. (2d) 781, certiorari denied, 287 U. S. 619 12
Keystone Steel & Wire Co. v. *Commissioner*, 62 F. (2d) 458 14
McCaughn v. *Real Estate Land Title & Trust Co.*, decided March 30, 1936 10
Newman v. *Commissioner*, 40 F. (2d) 225, certiorari denied, 282 U. S. 858 14
Prairie Oil & Gas Co. v. *Moeter*, 66 F. (2d) 309 12
Rodrigues v. *Edwards*, 40 F. (2d) 408 14
Southern Power & Mfg. Co. v. *Commissioner*, 82 F. (2d) 104 9
Starr v. *Commissioner*, 82 F. (2d) 964 12
Tulsa Tribune Co. v. *Commissioner*, 58 F. (2d) 937 13
West Texas Refining & D. Co. v. *Commissioner*, 68 F. (2d) 77 13
Wright v. *Commissioner*, 50 F. (2d) 727, certiorari denied, 284 U. S. 652 14

Statute:

Revenue Act of 1918, c. 18, 40 Stat. 1057:
Sec. 201 18
Sec. 202 18

Miscellaneous:

Treasury Regulations 45:
Art. 1561 19
Art. 1563 20
Art. 1566 21
Art. 1567 21

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

TEX-PENN OIL COMPANY

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

M. L. BENEDUM

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

F. B. PARRIOTT

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue,

prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit entered in the above causes on April 17, 1936, reversing the decisions of the United States Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 60–154) is reported in 28 B. T. A. 917. The opinion of the Circuit Court of Appeals (R. 2335–2344) is not yet reported.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 17, 1936 (R. 2345–2346). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals is at liberty to reject documentary evidence as being inadequate to support the findings of the Board of Tax Appeals, and whether after rejecting the Board's findings the Circuit Court of Appeals may substitute therefor its own findings.

2. Upon conflicting evidence has the Board of Tax Appeals authority to find a value which does not exactly correspond to some figures in the testimony but which is within the range of the testimony?

3. Is stock deprived of a fair market value by an agreement of the parties restricting the sale of the stock for a limited period?

4. Does the burden of proof rest upon the Commissioner because he has changed his original determination?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 18–22.

STATEMENT

These three cases, consolidated for hearing in the Board of Tax Appeals, involved income taxes for the year 1919, aggregating, with interest, approximately $9,000,000. The basic question presented to the Board was whether or not the sales and exchanges of the Tex-Penn Oil Company (hereinafter called Tex-Penn) and its stockholders, referred to below, came within the nonrecognition provisions of Section 202 (b) of the Revenue Act of 1918, and Article 1567 of Regulations 45 promulgated thereunder (*infra*, pp. 18, 21). The issues were narrowed to whether or not the sole consideration received by Tex-Penn and its stockholders was stock of the Transcontinental Oil Company (hereinafter called Transcontinental); and, if cash as well as stock was received, the fair market value of such stock when received. The facts may be summarized as follows:

During 1917 and the early part of 1918, respondents Benedum and Parriott and three associates, Wrather, Kirkland, and Lantz, acquired thirty-one oil and gas leases covering between 3,500 and 4,000 acres in Texas. The leases, known as the Duke-Knoles leases, reserved a one-eighth royalty to lessors (R. 64, F. 4–5). Benedum held a six-sixteenths interest, Parriott a three-sixteenths interest, and those of the other three aggregated seven-sixteenths in the remaining seven-eighths (R. 65, F. 6).

The money necessary for drilling was furnished by the five individuals in proportion to their interests in the leases, and in September 1918 the discovery well was brought in with an initial daily production of 500 barrels (R. 65, F. 8–9).

In October 1918 Tex-Penn was organized. The lessees subscribed, pro rata, to the 4,000 shares then issued at par. The $100,000 paid for such stock was the same day paid back to the individuals by Tex-Penn in exchange for a two-eighths interest in the leases (R. 66, F. 10, 11). The instrument assigning the two-eighths interest in the leases to Tex-Penn provided that Tex-Penn was obligated to develop the leases and was to bear all costs of drilling, etc.; also that one-half of the proceeds of the individuals' five-eighths interest should be paid to Parriott to be used, if necessary, to pay any debts of Tex-Penn which it was unable to pay (R. 66, F. 12; R. 1799, Ex. 11). Contem-

poraneously, the lessees executed a trust designating Parriott to represent them in carrying out the provisions of the assignment (R. 67, F. 13, 15). Tex-Penn completed twelve wells; eight showed an initial production of oil, three were gas wells, and one was dry (R. 106).

Early in 1919 it was proposed to consolidate the individuals' five-eighths royalty interest in the Duke-Knoles leases, the properties of Tex-Penn, and of three other corporations in which Benedum and Parriott were interested, for the purpose of creating an integrated unit combining all phases of the oil business. It was contemplated that the main supply of crude oil would come from the Duke-Knoles leases (R. 68–69, F. 17).

Benedum obtained authorization to sell the five lessees' interest in the leases and in Tex-Penn (R. 70, F. 22). After negotiations with bankers, who agreed first to raise $23,000,000 and then reduced the offer to $20,000,000, Transcontinental was organized with a capital stock of 2,000,000 shares. The bankers agreed to purchase 500,000 shares at $40 per share and received an option to purchase 225,000 additional shares at $1 per share, and also a bonus of 25,000 shares (R. 71–72, F. 23–26).

On July 12, 1919, the three other lessees sold their stock in Tex-Penn to Benedum and Parriott for $30, to be returned unless they received $5,250,000 from Transcontinental for their royalty interests (R. 74–76, F. 31; R. 93, F. 57).

On July 24, 1919, one Holliday, as agent for Transcontinental, offered in writing to purchase all Tex-Penn properties "for a consideration of $350,000 in cash and * * * stock of Transcontinental", the interests of Benedum and Parriott in the leases for $3,400,000, and the interests of the other three lessees for $5,250,000 (R. 82–84, F. 41–42).

Tex-Penn directors by resolution of July 25, 1919, accepted Transcontinental's offer of "$350,000 cash and * * * stock" (R. 84, F. 43). Holliday by letter directed Transcontinental to pay Tex-Penn $350,000 in cash. Transcontinental delivered its check for $350,000 to Tex-Penn on July 31, 1919 (R. 91, F. 51). Tex-Penn in its 1919 income tax return reported the sale of its assets for $350,000 cash and shares of Transcontinental (R. 97, F. 66).

The Transcontinental stock was, at the direction of Tex-Penn, delivered directly to Benedum and Parriott (R. 85, F. 43). Benedum and Parriott agreed orally with the bankers not to dispose of such stock during the life of the syndicate which had purchased the 500,000 shares. The syndicate ended in early January 1920 (R. 98–100, F. 67–71).

Transcontinental stock sold on the exchange through March, 1920, at from $20 to $60 per share (R. 101, F. 74).

The petitions to the Board involved the tax liability of Tex-Penn and of Benedum and Parriott.

The tax liabilities of Benedum and Parriott are largely the transferee liabilities of Tex-Penn (R. 2124, 2270) and, so far as now material, may be disregarded. The Board decided that the gains derived from such sales and exchanges were taxable and did not fall within the nonrecognition provisions of Section 202 (b) of the 1918 Act, *infra,* pp. 18–19. Its decision was based upon its findings that Tex-Penn received $350,000 in cash as well as stock for its assets; that the stockholders received cash and stock for their Tex-Penn stock; and that the Transcontinental stock received in exchange had a fair market value of $7 per share (R. 60–154).

The Circuit Court of Appeals reversed the Board, holding that there was no substantial evidence to support the Board's finding that cash as well as stock was received on the exchange; that the Board erred in fixing a value of $7 per share on the Transcontinental stock; and that, in any event, the Commissioner had changed his original determination and thereafter the burden of proof rested on the Commissioner, which burden he had not met (R. 2335–2344).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Tex-Penn did not receive $350,000 cash, as well as stock, in exchange for its assets.

80446—36——2

2. In holding that the individual stockholders did not receive cash in the transaction.

3. In holding that the transaction was tax-exempt.

4. In setting aside the Board's finding of value of Transcontinental stock.

5. In holding that the Board upon the conflicting evidence was without authority to find a value which did not exactly correspond to some figure in the testimony, and that the Board could not exercise its judgment and find a figure which was within the range of the testimony.

6. In holding that an agreement between the parties restricting the sale of Transcontinental stock for a limited period deprived such stock of its fair market value.

7. In holding that the burden of proof rested upon the Commissioner because he had changed his original determination.

8. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRITS

1. The Board's decision that the capital gain is taxable and that the non-recognition provisions of Section 202 (b) of the 1918 Act are inapplicable is based upon its finding that Tex-Penn received cash as well as stock from Transcontinental in

exchange for its assets.[1] This finding is fully supported by the written offer made by Transcontinental in July 1919, to purchase the Tex-Penn assets for cash and stock (R. 82–84, F. 41–42); by the resolution of Tex-Penn directors accepting such offer (R. 84, F. 43); by the letter directing Transcontinental to pay Tex-Penn $350,000 in cash (R. 90, F. 49); by the check for $350,000 delivered by Transcontinental to Tex-Penn (R. 91, F. 51), and by the 1919 tax return of Tex-Penn reporting the sale of its assets for cash and stock (R. 97, F. 66). The decision of the court below that these documents are not substantial evidence to support the Board's findings is in direct conflict with the decision of the Fifth Circuit in *Southern Power & Mfg. Co.* v. *Commissioner*, 82 F. (2d) 104, 105.

2. In addition to rejecting proper findings of the Board, the court below has found as a fact that the $350,000 received by Tex-Penn was not consideration paid for Tex-Penn assets but was supplied by the five lessees to be used to the extent needed to pay the debts of Tex-Penn. This finding is contrary to the finding of the Board and the Circuit

[1] Unlike the reorganization statutes recently considered in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378; *Helvering* v. *Watts*, 296 U. S. 387; *G. & K. Mfg. Co.* v. *Helvering*, 296 U. S. 389; and *Bus & Trans. Corp.* v. *Helvering*, 296 U. S. 391, the tax-free exchange provisions of the Revenue Act of 1918, *infra*, were applicable only where the consideration received by the transferor was solely stock.

Court of Appeals had no authority to make it. *Helvering* v. *Rankin,* 295 U. S. 123, 131–132; cf. *McCaughn* v. *Real Estate Land Title & Trust Co.,* No. 629, October Term 1935, decided March 30, 1936.

Moreover, the court below made this finding of fact because of its reliance upon two subsidiary facts, one of which is irrelevant and the other of which was stated in plain misapprehension of the record. (1) Because the individual lessees were anxious for completion of this transaction with a vendee possessed of limited funds, they consented that their share of the cash be correspondingly reduced in order that Tex-Penn could receive sufficient cash to discharge its outstanding obligations (R. 76–78, F. 34; R. 92–93, F. 55–56; R. 94, F. 59; R. 95–96, F. 62). This explains *why* Tex-Penn received the $350,000 from Transcontinental but in no manner refutes the plain fact that it did receive the cash from Transcontinental. (2) The court below states in effect that a balance of $55,255.24 was returned to the individual lessees out of the $350,000 (R. 2340). This assertion can be explained only on the ground that the court misread the record (R. 94) and failed to understand that this refund was from the wholly separate fund of $286,891.29 which had accumulated under the agreement to reserve one-half of the income from the five-eighths interest of the individual lessees in order to make up any deficit of Tex-Penn (R. 66, F. 12; R. 1799, Ex. 11).

3. The Board held the transaction not to be a tax-exempt reorganization for the independent reason that the stockholders of Tex-Penn received cash as well as stock as consideration for the transfer. See Article 1567 of Regulations 45, *infra*. The Board held, since the sale of Tex-Penn stock by Wrather, Lantz, and Kirkland was for a nominal consideration of $30, and was conditioned upon receipt from Transcontinental of $5,250,000 for their interest in the leases, that they must be taken to have received cash from Transcontinental for the transfer of their interest in Tex-Penn assets (R. 129–131). The court below in plain misapprehension of the decision regarded this reasoning as directed toward the stock of Benedum and Parriott and reversed the Board for no expressed reason other than the characterization that the reasoning was "a long, unsatisfactory argument" without "evidence as distinguished from supposition to support such a theory" (R. 2341).

The nominal sale of stock to Benedum and Parriott by Wrather, Lutz, and Kirkland was conditioned upon their receipt of $5,250,000 for their leasehold interest (R. 74–78, F. 31–34). This amount would be paid by Transcontinental only as a part of the transaction whereby it acquired the assets of Tex-Penn (R. 68, 71–72, 79–82). It is plain that the nominal sale of the stock, the transfer of the assets of the Tex-Penn and the sale of the five-eighths interest in the leases constituted a single, indivisible transaction. As such it was

not included in the narrow exemption provided by Section 202 (b) of the 1918 Act, since the acquisition of the privately owned leasehold interests by Transcontinental made the transaction more than the mere reorganization of Tex-Penn. And even if it could be termed a reorganization under that section, it is excluded from the nonrecognition provision, because three stockholders received cash in the transaction.[2] See Article 1567 of Regulations 45, *infra*.

The court below could have reached the conclusion that no stockholder received cash in the transaction only by breaking the transaction into isolated transfers and by ignoring the realities of the transaction. Its decision necessarily conflicts with the decisions of other circuits that a single transaction may not be split into separate elements to alter tax liability. *Starr* v. *Commissioner*, 82 F. (2d) 964, 968 (C. C. A. 4th); *First Seattle Bank* v. *Commissioner*, 77 F. (2d) 45, 48–49 (C. C. A. 9th); *Howard* v. *Commissioner*, 56 F. (2d) 781 (C. C. A. 6th); certiorari denied, 287 U. S. 619; *Prairie Oil & Gas Co.* v. *Motter*, 66 F. (2d) 309 (C. C. A. 10th);

[2] The $5,250,000 paid to Wrather, Lutz, and Kirkland was in part for their interest in the Tex-Penn assets. This is shown by the condition that the nominal sale for $30 would be effective only if the $5,250,000 were paid for the lease interests and by the testimony of Wrather, the only survivor (R. 708), that the stock would not have been sold at that figure without assurance that the $5,250,000 would be paid for the lease interests (R. 710). It follows that these stockholders received cash not only in the entire transaction but also in payment for the Tex-Penn assets.

West Texas Refining Co. v. Commissioner, 68 F. (2d) 77, 79–80 (C. C. A. 10th); *Tulsa Tribune Co.* v. *Commissioner,* 58 F. (2d) 937 (C. C. A. 10th); *Ahles Realty Corp.* v. *Commissioner,* 71 F. (2d) 150 (C. C. A. 2d), certiorari denied, 293 U. S. 611; *Commissioner* v. *Moore,* 48 F. (2d) 526 (C. C. A. 10th), certiorari denied, 284 U. S. 620; *Commissioner* v. *Garber,* 50 F. (2d) 588 (C. C. A. 9th), certiorari denied, 284 U. S. 620.

4. The Board, after reviewing all the evidence, found that the Transcontinental stock received in the exchange had a fair market value of $7 per share. The evidence upon which this finding was based consisted in part of the opinion of experts, some of whom testified that the stock had no fair market value (R. 968, 981–982) and others that it had a value of from $10 to $12 per share (R. 1636, 1661). Aside from the opinion testimony, considerable factual evidence was introduced showing the asset value of the corporation, stock sales, prospects of the corporation, and other factors which would indicate that the stock had a value in excess of that found by the Board. (See R. 102–115, F. 76–111.) The stock was traded on the New York Curb Exchange (as many as 9,900 shares daily) on a when-issued basis from June 21 to August 12, 1919, from a low of $43 to a high of $49.75 per share. In the latter part of July and on August 1, 1919, the sales ranged from a low of 47¼ to 49¾ per share. The stock was approved for listing on the New York Stock Exchange on August 13, 1919. Sales

thereafter through March 1920 ranged from a low of 20 to a high of 62⅝ (R. 101, F. 74). The decision below that the Board was not at liberty to disregard expert testimony and exercise its own judgment in arriving at a value not specifically testified to but within the range of the testimony is in direct conflict with *Gloyd* v. *Commissioner,* 63 F. (2d) 649 (C. C. A. 8th); *Keystone Steel & Wire Co.* v. *Commissioner,* 62 F. (2d) 458 (C. C. A. 7th); *Grand Rapids Store Equipment Corp.* v. *Commissioner,* 59 F. (2d) 914 (C. C. A. 6th); *Emerald Oil Co.* v. *Commissioner,* 72 F. (2d) 681, 683 (C. C. A. 10th); and *Anchor Co.* v. *Commissioner,* 42 F. (2d) 99, 100 (C. C. A. 4th).

5. As a part of the transaction in question Benedum and Parriott agreed orally not to dispose of the Transcontinental stock received by them for a limited period (R. 98–99, F. 68–69). The decision of the court below (R. 2342) that this restrictive agreement made it impossible to fix with any certainty any real value for this stock conflicts with *Fesler* v. *Commissioner,* 38 F. (2d) 155, 157 (C. C. A. 7th), certiorari denied, 281 U. S. 755; *Newman* v. *Commissioner,* 40 F. (2d) 225, 226 (C. C. A. 10th), certiorari denied, 282 U. S. 858; *Rodrigues* v. *Edwards,* 40 F. (2d) 408 (C. C. A. 2d); *Wright* v. *Commissioner,* 50 F. (2d) 727, 729–730 (C. C. A. 4th), certiorari denied, 284 U. S. 652; and *Helvering* v. *Kendrick Coal & Dock Co.,* 72 F. (2d) 330, 333 (C. C. A. 8th); *G. & K. Mfg. Co.* v. *Commissioner,* 76 F. (2d) 454 (C. C. A.

4th), this question eliminated by this Court in granting certiorari, 296 U. S. 563.

6. The court below, in holding (R. 2343–2344) that the burden of proof rested upon the Commissioner because he had changed his original determination, has misapplied and extended the decision of this Court in *Helvering* v. *Taylor*, 293 U. S. 507. The *Taylor* case merely holds that the case should be remanded for further hearing where the Board, because the taxpayer had failed to show the proper amount of tax liability, enters its decision affirming a determination of the Commissioner which is concededly arbitrary and excessive. In this case, however, the Board's redetermination was not made by merely accepting the figure set by the Commissioner. The Board reached its decision by a consideration of all the evidence and the taxpayers here are not called upon to pay a tax which confessedly they do not owe. In construing the *Taylor* decision as placing the burden of proof on the Commissioner merely because the Commissioner has departed from the calculations set forth in the 60-day letter,[3] the court below has

[3] The calculations set forth in the deficiency letter were revised in the Commissioner's answer and again in his brief before the Board; the court below seems also to object to the revision made under Rule 50 after the decision of the Board. Every revision save an intermediate one relating to Benedum and Parriott was in favor of the taxpayer. Compare: Tex-Penn, R. 41, 57, and 285; Benedum, R. 2072, 2080, 2105, and 2121; Parriott, R. 2220, 2230, 2253, and 2268.

erroneously decided a question of large importance to the Treasury Department, since it will confuse the procedure in a very large number of cases arising in the Board of Tax Appeals.

In consequence of its decision that the Commissioner bore the burden of proof, the court below held that the Board was in error in entering a judgment of deficiency when, as the court viewed it, the evidence was insufficient to establish a cost basis of the Oldham and Sultan Counties and South American properties transferred by Benedum and Parriott to Tex-Penn just prior to the transfer of assets to Transcontinental.[4] Yet the taxpayers before the Board expressly conceded that the evidence warranted no other finding by the Board and expressly refused to put in any further evidence to demonstrate error as to the cost basis used in the computation under Rule 50 (R. 1750–1751, 1757–1758).

---

[4] There was evidence to support the finding of cost of these properties. The taxpayers did not object to the finding of their *value* at the time of transfer to Tex-Penn, which was apparently about $158,000, the difference between a stipulated value of $221,500 for a group of minor properties, including those here considered, and the value of $63,223.29 for properties in this group other than those in Oldham and Sultan counties and South America (R. 1742–1743, 766). They complained rather that the market value of the 66,880 shares of Tex-Penn issued to Benedum and Parriott for these properties just prior to the transfer of assets to Transcontinental should be the cost basis both to Tex-Penn and to the individuals (R. 1745–1746, 1760–1762). The Board refused to accept such a transaction, not made at arm's length, as the only evidence of cost of these properties.

CONCLUSION

The court below has rejected findings of fact made by the Board which had not only substantial but preponderant support in the evidence. It has substituted its own findings of fact which find little or no support in the record. Its opinion shows misapprehension of the record and of the decision of the Board. Its concluding paragraph states (R. 2344): "A tax with deficiencies and interest of over $9,100,000 seems indefensible on any theory." It is submitted that there has been a departure from the accepted and usual course of judicial proceedings.

Moreover, in addition to its disregard of established principles governing review of decisions by the Board of Tax Appeals, the court below has also decided several points of law in direct conflict with the decisions of other Circuit Courts of Appeals. Finally, its decision that if the Commissioner changes the method of calculation adopted in his deficiency letter this has the effect of shifting to him the burden of proof before the Board arises from misapplication of a decision of this Court and presents a question of considerable importance in the administration of the revenue laws.

WHEREFORE, it is respectfully submitted that this petition for writs of certiorari should be granted.

STANLEY REED,
Solicitor General.

JULY 1936.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1059, 1060:

SEC. 201.

* * * * *

(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits.

SEC. 202. (a) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

(2) In the case of property acquired on or after that date, the cost thereof; or the inventory value, if the inventory is made in accordance with section 203.

(b) When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock

or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged.

When in the case of any such reorganization, merger, or consolidation the aggregate par or face value of the new stock or securities received is in excess of the aggregate par or face value of the stock or securities exchanged, a like amount in par or face value of the new stock or securities received shall be treated as taking the place of the stock or securities exchanged, and the amount of the excess in par or face value shall be treated as a gain to the extent that the fair market value of the new stock or securities is greater than the cost (or if acquired prior to March 1, 1913, the fair market value as of that date) of the stock or securities exchanged.

Treasury Regulations 45, promulgated under the Revenue Act of 1918:

ART. 1561. *Basis for determining gain or loss from sale.*—For the purpose of ascertaining the gain or loss from the sale or exchange of property the basis is (*a*) its fair market price or value as of March 1, 1913, if acquired prior thereto, or (*b*) if acquired on or after that date, its cost or its approved inventory value. In both cases proper adjustment must be made for any depreciation or depletion sustained. What the fair market price or value of property was on March 1, 1913, is a question of fact to be established by any evidence which will reasonably and adequately make it appear. As to inventories see section 203 of the statute and articles 1581–1588. The

fair market value as of March 1, 1913, has no bearing on the determination of the invested capital of a corporation for the purpose of the war-profits and excess-profits tax. See section 326 and article 831.

ART. 1563. *Exchange of property.*—Gain or loss arising from the acquisition and subsequent disposition of property is realized when as the result of a transaction between the owner and another person the property is converted into cash or into property (*a*) that is essentially different from the property disposed of, and (b) that has a market value. In other words, both (*a*) a change in substance and not merely in form, and (*b*) a change into the equivalent of cash, are required to complete or close a transaction from which income may be realized. By way of illustration, if a man owning ten shares of listed stock exchanges his stock certificate for a voting-trust certificate, no income is realized, because the conversion is merely in form; or if he exchanges his stock for stock in a small, closely held corporation, no income is realized if the new stock has no market value, although the conversion is more than formal; but if he exchanges his stock for a Liberty bond, income may be realized, because the conversion is into independent property having a market value. "Market value" is the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair price, both having reasonable knowledge of the facts, will trade. Property received in exchange for other property has no "fair market value" for the purpose of determining gain or loss resulting from such exchange when, owing to the condition of the market, there can be no reasonable expectation that the owner of the property, though wishing to

sell and any person wishing to buy will agree upon a price at which to trade unless one or the other is under some peculiar compulsion. It does not follow that property has no "fair market value" merely because there is no price therefor established by public sales or sales in the way of ordinary business. The property received in exchange may be real estate, personal property, or a chose in action. Where the owner of a bond exercises the right, provided for in the bond, of converting the bond into stock in the obligor corporation, such transaction does not result in a realization of profit or loss, the transaction not being closed for purposes of income taxation until such stock is sold.

ART. 1566. *Exchange of property and stock.*—Where property is transferred to a corporation in exchange for its stock, the exchange constitutes a closed transaction and the former owner of the property realizes a gain or loss if the stock has a market value, and such market value is greater or less than the cost or the fair market value as of March 1, 1913 (if acquired prior thereto), of the property given in exchange. For the rule applicable where a corporation, in connection with a reorganization, merger, or consolidation, exchanges property for stock, see article 1567.

ART. 1567. *Exchange of stock for other stock of no greater par value.*—In general, where two (or more) corporations unite their properties by either (*a*) the dissolution of corporation B and the sale of its assets to corporation A, or (*b*) the sale of its property by B to A and the dissolution of B, or (*c*) the sale of the stock of B to A and the dissolution of B, or (*d*) the merger of B into A, or (*e*) the consolidation of the corporations,

no taxable income is received from the transaction by A or B or the stockholders of either, provided the sole consideration received by B and its stockholders in (*a*), (*b*), (*c*), and (*d*) is stock or securities of A, and by A and B and their stockholders in (*e*) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered. The term "reorganization", as used in section 202 of the statute, includes cases of corporate readjustment where stockholders exchange their stock for the stock of a holding corporation, provided the holding corporation and the original corporation, in which it holds stock, are so closely related that the two corporations are affiliated as defined in section 240 (b) of the statute and article 633, and are thus required to file consolidated returns. So-called no-par-value stock issued under a statute or statutes which require the corporation to fix in a certificate or on its books of account or otherwise an amount of capital or an amount of stock issued which may not be impaired by the distribution of dividends, will for the purpose of this section be deemed to have a par value representing an aliquot part of such amount, proper account being taken of any preferred stock issued with a preference as to principal. In the case (if any) in which no such amount of capital or issued stock is so required, no-par-value stock received in exchange will be regarded for purposes of this section as having in fact no par or face value, and consequently as having "no greater aggregate par or face value" than the stock or securities exchanged therefor.

U. S. GOVERNMENT PRINTING OFFICE: 1938